FILE COPY

Supreme Court, U. S.
FILED
JAN 11 1973
MICHAEL RODAK, JR., CLE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

NO. 72-775

PAUL WARREN BATES,
PETITIONER

—VS—

STATE OF ALABAMA,
RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF CRIMINAL APPEALS OF ALABAMA

BRIEF FOR RESPONDENT IN OPPOSITION

WILLIAM J. BAXLEY
Attorney General of Alabama

RICHARD F. CALHOUN
Assistant Attorney General
of Alabama

Attorneys For Respondent

250 Administrative Building
Montgomery, Alabama 36104

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

NO. 72-775

PAUL WARREN BATES,
PETITIONER

—VS—

STATE OF ALABAMA,
RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF CRIMINAL APPEALS OF ALABAMA

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinions below are adequately set forth in the Petition.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTION PRESENTED FOR REVIEW

The question presented for review is adequately set forth in the Petition.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The constitutional provisions and statutes involved are adequately set forth in the Petition.

STATEMENT

This case arose out of the arrest and subsequent indictment by the Madison County, Alabama Grand Jury of Paul Warren Bates on a charge of possession of a pistol after having been convicted of a crime of violence. The Petitioner entered a plea of not guilty and the case was tried before a jury in the Madison County, Alabama Circuit Court which found the Petitioner guilty on March 19, 1969. The Petitioner was sentenced to be imprisoned in the state penitentiary for a period of three years as punishment.

The conviction was appealed to the Court of Criminal Appeals of Alabama which affirmed the case in its opinion rendered June 30, 1972. Petitioner filed an Application For Rehearing which was denied, without opinion, by the Court of Criminal Appeals of Alabama on August 1, 1972. Petitioner then filed a Petition For Writ of Certiorari which was denied, without opinion, by the Supreme Court of Alabama on August 31, 1972.

It was stipulated in the State trial court that the Petitioner had been convicted of second degree burglary and grand larceny on May 2, 1960. These are crimes of violence within the meaning of Title 14, Section 174, Code of Alabama 1940, Recompiled 1958. See Title 14, Section 172, Code of Alabama 1940, Recompiled 1958.

Huntsville Policeman Randall Tishner, the arresting officer, testified that on the night of December 5, 1968, while patrolling in a police car, he was dispatched to the Bella Vista Club in Huntsville. When he arrived, a man was standing in the parking lot of the Bella Vista Club. Officer Tishner asked the man if he was Paul Warren Bates, and when the man replied in the affirmative, the officer conducted a search by patting down the outside of Bates' clothing. Defense counsel objected to any testimony concerning the fruits of the search. Out of the presence of the jury the State made a showing by Officer Tishner that he received a call that Bates had a pistol and was at the Bella Vista Club. He further testified that he did not know Bates personally but that he had learned that in the process of a burglary in a grocery store in Huntsville Bates was involved in the incident during which a police officer was shot at. Regarding the manner in which the search was made, Officer Tishner further testified that after Bates identified himself, he had him put his hands against the outside wall of the club, patted the outside of his clothing and found a fully loaded pistol in his right front pant's pocket. Officer Tishner took the pistol from him and placed him under arrest.

This testimony was repeated in the presence of the jury and the pistol was introduced in evidence over the Petitioner's objection.

ARGUMENT

The Petitioner seeks to have this Honorable Court grant certiorari in this cause predicated upon his erroneous contention that the police conduct in seizing the pistol from his person and the pistol's subsequent introduction into evidence contravened the proscription of the Fourth Amend-

ment made obligatory upon the States via the Fourteenth Amendment.

This Honorable Court in its recent decision enunciated in *Adams v. Williams*, 407 U.S. 143, 92 S. Ct. 1921, 32 L. Ed.2d 612, held that a policeman in making an investigatory stop based on an informer's tip, may conduct a limited protective search for concealed weapons when he has reason to believe that the suspect is armed and dangerous. The evidence in that case showed that a police sergeant was alone early in the morning on patrol duty in a high crime area of Bridgeport, Connecticut at approximately 2:15 A.M. when a person known to him approached his cruiser and informed him that an individual seated in a nearby vehicle was carrying narcotics and had a gun at his waist. The policeman approached the vehicle to investigate the informant's report, tapped on the car window, and asked the occupant to open the door. When the occupant rolled down the window instead of opening the door, the policeman reached into the car and removed a fully loaded revolver from the occupant's waistband. The gun had not been visible to the policeman from outside the car but was precisely in the place indicated by the informant. The occupant of the car was then arrested by the policeman for unlawful possession of the pistol. A search incident to the arrest was conducted following the arrival of other officers and disclosed substantial quantities of heroin on the occupant's person and in the car as well as a machete and a second revolver hidden in the automobile.

In rejecting the respondent's contention that the rationale of *Aquilar v. Texas*, 378 U.S. 108, 84 S. Ct. 509, 12 L. Ed.2d 723, was applicable to the informant's tip, this Court stated:

"In reaching this conclusion, we reject respondent's

argument that reasonable cause for a stop and frisk can only be based on the officer's personal observation, rather than on information supplied by another person. Informants' tips, like all other clues and evidence coming to a policeman on the scene, may vary greatly in their value and reliability. One simple rule will not cover every situation. Some tips, completely lacking in indicia of reliability, would either warrant no police response or require further investigation before a forcible stop of a suspect would be authorized. But in some situation — for example, when the victim of a street crime seeks immediate police aid and gives a description of his assailant, or when a credible informant warns of a specific impending crime — the subtleties of the hearsay rule should not thwart an appropriate police response."

This Court further stated that "the informant was known to him personally and had provided him with information in the past." It is noteworthy that the Court did not use the word, "reliable," in characterizing the information that the informant had previously supplied this police officer.

For a better understanding of the reliability of the informant in *Adams*, supra, the Respondent quotes from the dissenting opinion of Mr. Justice Marshall:

"The only information that the informant had previously given the officer involved homosexual conduct in the local railroad station. The following colloquy took place between respondent's counsel and the officer at the hearing on respondent's motion to suppress the evidence that had been seized from him.

"Q. Now, with respect to the information that was given you about homosexuals in the Bridgeport Police Station [sic], did that lead to an arrest? A. No.

"Q. An arrest was made. A. No. There was no substantiating evidence.

"Q. There was no substantiating evidence? A. No.

"Q. And what do you mean by that? A. I didn't have occasion to witness these individuals committing any crime of any nature.

"Q. In other words, after this person gave you the information, you checked for corroboration before you made an arrest. Is that right? A. Well, I checked to determine the possibility of homosexual activity.

"Q. And since an arrest was made, I take it you didn't find any substantiating information. A. I'm sorry counselor, you say since an arrest was made.

"Q. Was not made. Since an arrest was not made, I presume you didn't find any substantiating information. A. No.

"Q. So that, you don't recall any other specific information given you about the commission of crimes by this informant? A. No.

"Q. And you still thought this person was reliable. A. Yes."

Hence, it is readily apparent that no substantial difference exists between the facts in *Adams*, supra, and those

in the case *sub judice*. In the present case Officer Tishner received a radio dispatch that the Petitioner was at a certain place armed with a pistol. Police officers had been shot at during the commission of a burglary in which the Petitioner was involved. With this knowledge it would certainly have been poor police work for Officer Tishner to have ignored this dispatch. When he arrived at the Bella Vista Club, he found the Petitioner present which tended to corroborate the information he had received. Considering what Officer Tishner knew, he had reason to believe that the Petitioner was armed and very possibly dangerous.

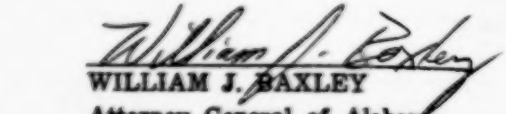
Accordingly, the Court of Criminal Appeals of Alabama is palpably correct in its conclusion that the radio dispatch, together with the knowledge possessed by Officer Tishner and his visual corroboration, justified the patting down of the Petitioner and the removal of his pistol, such action constituting reasonable police conduct within the meaning of the Fourth Amendment. For analogous cases upholding searches based upon anonymous tips coupled with visual corroboration see *Ballou v. Massachusetts*, 403 F.2d 982, cert. denied 394 U.S. 909, 89 S. Ct. 1024, 22 L. Ed.2d 222; *U. S. v. Walker*, D. C. App., 294 A.2d 376; *People v. Taggart*, 20 N.Y.2d 335, 229 N. E.2d 581; *People v. Jeffries*, 197 N. W.2d 903. See also *People v. Fenuta*, 332 N.Y.S.2d 92.

The pronouncements of this Court in *Adams*, supra, are manifestly controlling herein. The Petitioner's contentions to the contrary were correctly disposed of in the Alabama Court of Criminal Appeals and do not warrant consideration by this Court on certiorari.

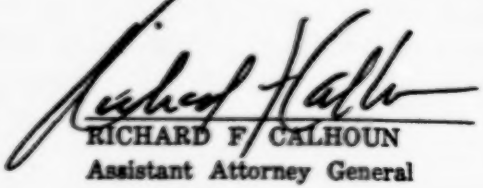
CONCLUSION

For the foregoing reasons it is respectfully submitted that the instant Petition For Writ of Certiorari is due to be denied.

Respectfully submitted,



WILLIAM J. BAXLEY
Attorney General of Alabama



RICHARD F. CALHOUN
Assistant Attorney General
of Alabama

ATTORNEYS FOR RESPONDENT

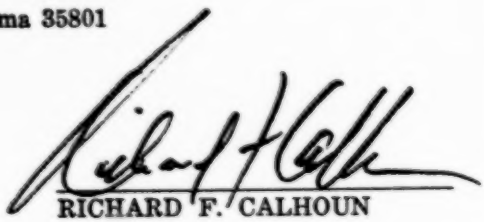
ADDRESS:

250 Administrative Building
Montgomery, Alabama 36104

CERTIFICATE OF SERVICE

I, Richard F. Calhoun, one of the Attorneys For Respondent, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 10th day of JANUARY, 1973, I served copies of the foregoing Brief in Opposition of Respondent on Honorable Charles Curtis King, by placing said copies in the mail, postage prepaid, and properly addressed to said attorney of record, as follows:

Sullins and King
Attorneys at Law
206 Randolph Avenue, S.E.
Huntsville, Alabama 35801



RICHARD F. CALHOUN

OF COUNSEL